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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

EDWARD BRUCE HITCHKO, Plaintiff and Appellant, v. MICHAEL L. BOREING, et al. Defendants and Respondents.	A144455 (Humboldt County Super. Ct. No. PR100152)

Plaintiff Edward Bruce Hitchko (Hitchko) is one of the beneficiaries (along with his five siblings) of a trust established by his parents. After the parents died, two Hitchko siblings became cotrustees. Disagreement among the six siblings regarding management of the trust led one of Hitchko's sisters to initiate this probate case, resulting in the removal of one of the cotrustees and the court appointment of defendant Michael Boreing as an independent cotrustee of the trust.

The trust's principal asset was the parents' home located on Freshwater Road in Eureka (Freshwater property). When Boreing was appointed a cotrustee, the probate court also ordered the cotrustees to sell the Freshwater property and report the proceeds from the sale. Defendants Robert and Debra McBeth bought the Freshwater property from the trust in March 2013. The sale of the Freshwater property is the subject of this appeal.

At the time of the sale, Hitchko was living on the property, which comprised 24 acres and had been in the Hitchko family since 1954. Hitchko had hoped to buy the property himself and has engaged in continuous litigation attempting to undo the sale

since the day escrow closed. First, he filed a petition to stop the sale of trust property. Next, he initiated a new civil lawsuit against Boreing, the McBeths, and defendant Sue Forbes, the realtor who represented the trust in the sale. After the trial court sustained demurrers to the third iteration of his complaint without leave to amend, he returned to this probate case.

Hitchko has filed a petition against defendants, seeking imposition of a constructive trust and rescission of the sale and alleging a variety of claims including breach of contract and violation of duties, negligence, and intentional infliction of emotional distress. He filed his first amended petition—essentially his fifth attempt to state a claim related to the sale the Freshwater property—and defendants demurred. The probate court sustained the demurrers without leave to amend, and Hitchko appeals the judgment following the court's order sustaining the demurrers.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Original Probate Case*

In 1993, Michael and Marion Hitchko established the Hitchko family revocable trust. The trust provided that, upon the death of the surviving spouse, the trust estate was to be distributed to their adult children in equal shares. The trust document identified the Hitchkos' six children as "Michael J. Hitchko, Jr., Barbara J. Carroll, Francis K. Hitchko, Edward B. Hitchko, Mary C. Hitchko and Gregory P. Hitchko."

The surviving trustor, Marion Hitchko, died in 2007. Following their mother's death, Barbara Hitchko (referred to as "Barbara J. Carroll" in the trust instrument) and Michael J. Hitchko, Jr., became cotrustees of the trust. In June 2010, M. Catherine Hitchko (referred to as "Mary C. Hitchko" in the trust instrument) petitioned to remove the cotrustees, alleging they breached their fiduciary duties and administered the trust under a conflict of interest. Catherine alleged that cotrustee Barbara "wish[ed] to purchase the Trust's real property asset [i.e., the Freshwater property] to the financial

detriment of the other beneficiaries," and co-trustee Michael acquiesced to Barbara's wish.[1] In response, Barbara did not dispute that she wanted to buy the Freshwater property and proposed she "abstain from service with respect to the property to avoid any purported, potential conflict."[2]

After a court trial, Judge Marilyn Miles filed a tentative decision on October 29, 2012, finding Barbara had an actual conflict of interest as to the sale and purchase of the Freshwater property. The tentative decision provided for the removal of Barbara as a cotrustee but allowed Michael to remain a cotrustee. The court found, however, that "given the demonstrated misadministration of the trust," "an independent and qualified co-trustee should be appointed to serves as co-trustee," and appointed Boreing, a certified public accountant, successor cotrustee in place of Barbara. The tentative decision further ordered the cotrustees to sell the Freshwater property and report the proceeds of the sale.[3]

On January 25, 2013,[4] the probate court filed an order generally adopting the orders stated in its tentative decision (January 25 order). The court removed Barbara as a cotrustee, appointed Boreing as cotrustee, and ordered that co-trustees Michael and Boreing "shall take control of the Trust's Freshwater property, and as Co-Trustees immediately list said property for sale. . . ." In paragraph 4 of the order, the court authorized the cotrustees "to take all reasonable action necessary to present the property for sale and to maximize its salability and price, including, but not limited to, removing

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[1] For brevity and clarity, we sometimes refer to the individual Hitchko siblings by first name only. No disrespect is intended.

[2] In fact, Barbara reported in her post-trial brief to the court that she and Hitchko submitted a written offer for the Freshwater property in September 2009 for "$750,000, later reduced to $720,000, based upon an appraisal at $660,000.00."

[3] Judge Miles wrote that the tentative decision would become the statement of decision unless a party specified controverted issues as to which the party requested a statement of decision or a party made proposals not included in the tentative decision. A party requested a further statement of decision, and Judge Miles filed a statement of decision on January 25, 2013.

[4] Remaining dates occurred in 2013, unless otherwise noted.

any occupants, vehicles, trailers, and livestock from the property." The cotrustees were to report to the court "the amount of gross and net sale proceeds . . . [and] withhold any distribution of said proceeds pending further Order of the Court." The order provided that the probate court retained jurisdiction pending completion of the sale in order to determine whether damages would be assessed against Barbara or Michael.

After the Freshwater property was listed for sale, the McBeths bought the property "as-is" for $705,000 cash.

B. *Hitchko's Efforts to Challenge the Sale*

On March 8, 2013, the day escrow closed on the sale of the Freshwater property to the McBeths, Hitchko and Barbara filed a "petition to stop sale of trust real property." They alleged the cotrustees violated the court's January 25 order and failed to take all reasonable action to maximize the property's salability and price. They alleged that any consent they may have given for the sale to the McBeths was obtained improperly because the cotrustees knew or should have known (and Hitchko and Barbara did not know) that "the Co-Trustees or their agents intended to market the property on a prearranged basis with the prospective buyers or with said prospective buyers' representatives and agent/realtor, pursuant to which the other potential buyers would be prohibited from presenting higher offers than that made by the McBeths." On May 10, the probate court ruled the petition was moot since the sale already had occurred.

On April 9, Hitchko and Barbara filed a complaint for imposition of constructive trust against the McBeths, *Hitchko v. McBeth*, Super. Ct. Humboldt County, 2013, No. DR 130230 (*Hitchko* civil lawsuit). They sought a preliminary injunction against the McBeths, which was denied. They filed a first amended complaint adding Boreing as a defendant and a second amended complaint (SAC) adding Forbes as a defendant.[5] Boreing and the McBeths demurred to the SAC.

[5] The McBeths filed a demurrer to the first amended complaint, which was sustained with leave to amend.

On November 22, 2013, a hearing on the demurrers to the SAC was held before Judge Miles, sitting in the civil division of the superior court. Counsel for Hitchko and Barbara implicitly conceded the SAC was defective in that it failed to allege facts showing the McBeths were not bona fide purchasers and failed to allege damages. Judge Miles observed the plaintiffs' pleadings indicated that the demurrers were well taken. The court sustained the demurrers without leave to amend "but without prejudice to a petition . . . being filed in the probate department."[6] Judge Miles instructed plaintiffs' counsel, "Any further attempt should include everything that you believe that you have evidence [of] and make those factual allegations so everybody knows what it is that you are specifically claiming and what remedies you might be seeking from the court . . . ."

The register of actions for the *Hitchko* civil lawsuit shows the remaining claims against Forbes were then dismissed at the request of the plaintiffs.

C. *The First Amended Petition—Factual Allegations and Causes of Action*

On March 7, 2014, Hitchko filed a petition for a constructive trust in the probate case. On June 20, 2014, he filed a 61-page first amended petition (FAP), the operative pleading for this appeal.[7] Attached to the FAP were extensive exhibits, labeled A through T and spanning 181 Bates-stamped pages, which Hitchko incorporated by reference.[8] In the FAP and exhibits, Hitchko alleged as follows.

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[6] Judge Miles also indicated her frustration with the plaintiffs' pleadings. After the court suggested that any potential claims against Boreing should be raised in the probate case (not a separate civil lawsuit), plaintiffs' counsel requested the court transfer the case to the probate department "rather than dismissing the case." Counsel urged that transfer was preferable because Hitchko and Barbara could save the $435 filing fee they would have to pay if they were required to file a new pleading. Judge Miles emphatically rejected the request, addressing counsel: "[Y]ou don't get to just throw spaghetti out and then say, ['']oh. I didn't do it this time but I know all of the stuff. I'm just not getting it in there.['] It just doesn't work that way. . . ."

[7] The register of actions for this case shows at least two defendants filed demurrers to the initial petition. In response, Hitchko filed the FAP.

[8] The exhibits attached included, among other things, the original trust instrument, real estate agency agreements, the McBeths' offer, notes made by Hitchko, and dozens of

On January 25, 2013, Tina Christensen, the McBeths' real estate agent, sent a letter to Will Kay, attorney for Catherine Hitchko (McBeth letter). Christensen wrote: "I represent Rob and Debbie McBeth who have an interest in purchasing the [Freshwater] property. I have indicated that I thought the proposed purchase price would be between $700,000 and $800,000 to which they have no problem submitting an offer based upon those figures.

"Rob and Debra are lifelong members of the Humboldt community with being the co[-]owners of O&M Industries and various other businesses and properties throughout the County. When we were representing the property for sale they contacted me at that time and were interested in viewing the home, and at that moment we could not show the property.

"Rob has indicated that they are willing to pay cash for the property and will accept it in its 'as is' condition. Should you have any further questions please do not hesitate to call." The letter was also signed by the McBeths.

On January 28, Kay forwarded a copy of the McBeth letter to Boreing, who had just been appointed cotrustee, but not to cotrustee Michael. In the FAP and on appeal, Hitchko places great significance on the McBeth letter.

On February 21, the cotrustees entered into a six-month residential listing agreement with Forbes & Associates, which is owned by Forbes. The cotrustees agreed with Forbes to list the Freshwater property at $675,000. The same day, cotrustee Michael told Hitchko he would have 10 days to make an offer on the property.

On Friday, February 22, the McBeths submitted an offer to purchase the property for $705,000 cash with escrow to close not later than March 11. The offer provided that

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emails to and from defendants regarding the sale, which Hitchko had obtained in discovery. Hitchko implicitly incorporated the emails by reference, alleging, "As the facts set forth in the Petition show, *especially through the e-mails attached hereto as Exhibits*, Co-Trustee breached his duties . . . ." (Italics added.)

it would be revoked if not accepted at 5:00 p.m. on February 25.[9] The Freshwater property was listed on the Multiple Listing Service (MLS) and "had been on the [MLS] for only two minutes before the MLS designation was changed to 'Pending.' " (Underscoring deleted.) The same day, cotrustee Michael told Hitchko that he would have three days to submit a competing offer to the McBeths' offer.

On Sunday, February 24, Hitchko met with Forbes, and Forbes agreed to serve as his buying agent (although she was also the selling agent for the trust). Hitchko alleged that he "tried to submit a signed offer for the sum of $720,000 (plus $5,000 for escrow and title costs)." Forbes prepared a written offer, which Hitchko explained would be from Hitchko and Kay Chaffey. Chaffey was a 92-year-old retired professor living in Medford, Oregon, who Hitchko alleged was prepared to give Hitchko $300,000. Hitchko told Forbes that a "loan of $300,000+ has been preapproved" and the rest of their offer would be in cash. Hitchko told Forbes that "if [Forbes] felt he should do so, he would drive up Sunday night to Medford, Oregon to obtain Kay Chaffey's signature on their joint offer," so Forbes would have the signed offer by noon the next day, Monday, February 25. In response, Forbes "did not answer directly, but seemed surprised. . .[and] seemed to discourage him from doing so."

The next day, Forbes called Hitchko and said he should forget about continuing his offer of $720,000. She told him that she recommended to the cotrustees that they accept the McBeths' cash offer. Forbes also told Hitchko she was trying to save him from wasting time trying to obtain written confirmation of his bank financing.

Prior to March 5, Barbara told Hitchko that escrow on the sale would close on Monday, March 11 (based on information she learned from cotrustee Michael). On March 6, Hitchko "sought legal counsel to preserve the opportunity for the . . .

[9] This was the standard "expiration of offer" in the California residential purchase agreement form used by the McBeths. That is, the pre-printed default was that the offer would be deemed revoked by 5:00 p.m. on the third day after the offer was signed by the buyer, unless a different time-frame was specified by the buyer.

[Freshwater] property to be marketed in a manner that would maximize, through full exposure of the real property, the salability, and price of the property while also assuring fair treatment of the offer of the $720,00 offer (plus $5,000 for escrow and title costs) being made by [him]." On Thursday, March 7, Hitchko received an email from Forbes that indicated escrow would close Friday, March 8.

On Friday, March 8, "there was at least one other sufficiently capitalized prospective buyer who did submit a competing bid for the property . . . for $730,000" that morning, but the bid received no consideration by the cotrustees or their agent.

Hitchko asserted 11 causes of action:

(1) "constructive trust" over the Freshwater property based on alleged "mistake and unintentional misunderstanding by the Co-trustees and their real estate agent of the meaning and mandatory nature of paragraph 4 of the [January 25] Order" and the McBeths' alleged "actual knowledge of . . . non-compliance" by the cotrustees of paragraph 4;

(2) "constructive trust" over the Freshwater property based on alleged violation of the January 25 order and breaches of duty, "specifically the duty to disclose material facts to the beneficiaries of the Trust," and the allegation that the McBeths had actual knowledge through their agent of the violations and breaches of duty (citing Civ. Code, § 2224);

(3) "rescission of sale" based on alleged violation of the January 25 order and breach of trust by Boreing and Forbes and the McBeths' alleged "knowledge of said violation and breaches of trust" (citing the court's inherent power to rescind the transaction);

(4) "void the sale" (same allegations as above, relying on the inherent power of the court);

(5) breach of contract and violation of duties against Forbes based on her alleged failure to "convey the offer that Bruce Hitchko was trying to present to the Co-Trustees";

(6) violation of duties against Boreing based on allegations that Boreing learned of the McBeth letter in late January but failed to tell the beneficiaries about it and that

Boreing "rushed and hastily concluded the sale to [the] McBeths without properly marketing the property";

(7) negligence against Forbes in allegedly breaching duties she owed to Hitchko "both as a client and as a beneficiary of the Hitchko Family Trust";

(8) professional negligence against Forbes for breach duties owed to Hitchko "in violation of her duties as a broker";

(9) interference with contractual relations against Robert McBeth because Robert McBeth "intended to and did disrupt the performance of th[e] contract" between Forbes and Hitchko "relating to Bruce Hitchko's intention to purchase" the Freshwater property;

(10) "interference of prospective economic benefit and advantage" against Robert McBeth because Hitchko was "effectively blocked from purchasing" the Freshwater property "even though he was prepared to pay a higher price than the McBeths"; and

(11) intentional infliction of emotional distress against all defendants, based on allegations that defendants "were all very much aware of the emotional attachment and significance felt by certain of the beneficiaries of the Hitchko Family Trust, including Bruce Hitchko," that Hitchko made Forbes "aware of the significance that he placed on the fact that the remains of his parents and grandparents had both been put to rest on" the Freshwater property, and that defendants "did not accommodate those family sentiments."

Hitchko sought an order declaring the McBeths held the Freshwater property as constructive trustees for the trust, an order compelling the McBeths to convey the property to the trust, an order voiding the sale of the property and freezing the cash proceeds of the sale, an order prohibiting the McBeths from making any modifications to the property, an order removing Boreing as cotrustee, return of the three percent commission received by Forbes, damages "according to proof," and punitive and exemplary damages.

D. *Demurrers*

The McBeths, Forbes, and Boreing filed demurrers.[10] Among other arguments, the McBeths argued Hitchko's allegations "of constructive or inquiry notice" were insufficient under Probate Code section 18100.[11] They maintained there was no basis for the claims of interference with contractual relations and prospective economic advantage because Hitchko (according to his own allegations) never signed an offer for the Freshwater property; he "simply gave up." They further argued Hitchko failed to state a claim for intentional infliction of emotional distress because no basis in tort law required the McBeths to "do[] whatever they could to make sure that [Hitchko] was given enough time to try to confirm his financing and submit an offer on the Property, even if that meant extending the time for acceptance of their own offer."

Forbes observed that the FAP represented Hitchko's fifth attempt to overturn the sale of the Freshwater property and his third attempt to state a cause of action against Forbes.[12] She argued that all of Hitchko's claims against her "founder[ed] on an essential element, causation" because he did not and could not allege the cotrustees would have preferred his inchoate "offer"—which was contingent on the signature of Chaffey and on Hitchko obtaining financing—over the all-cash offer from the McBeths. In addition, she

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[10] The McBeths also filed a motion to strike the FAP, which Boreing joined.

[11] Probate Code section 18100 provides: "With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them: [¶] (a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise. [¶] (b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise."

[12] Hitchko filed three pleadings in the *Hitchko* civil lawsuit (complaint, first amended complaint, and SAC) and two pleadings in the probate case (petition and FAP). He named Forbes in the SAC in the *Hitchko* civil lawsuit and in both iterations of the petition.

pointed out that exhibits to the FAP showed the cotrustees were well aware of Hitchko's intention to make an offer but "preferred the all-cash offer [of the McBeths] over the contingent offer" from Hitchko.[13]

Boreing argued that Hitchko failed to allege a breach of trust or fiduciary duty because (1) the McBeth letter was not a material fact that required disclosure, (2) Hitchko did not allege viable and competitive offers existed, (3) Boreing was not required to consult counsel, and (4) by Hitchko's own allegations, Boreing believed Hitchko had approved the sale of the Freshwater property to the McBeths.[14] Boreing maintained that

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[13] Hitchko devoted over five pages of the FAP to describing emails to and from Boreing, Forbes, and others regarding the sale (which he had obtained in discovery), and over 20 pages of emails were attached to the FAP as Exhibits Q1 through Q5.

Forbes pointed to emails in Exhibit Q4, which showed that, on Saturday, February 23, she wrote to Boreing and Michael, informing them that Hitchko had contacted her about writing an offer on the Freshwater property. Forbes told the cotrustees she planned to meet with Hitchko the next day and she would submit his offer as soon as it was available. On Monday, February 25, Forbes wrote to Boreing and Michael, "I spoke with Bruce [Hitchko] moments ago. He would like to pursue making an offer but it would have to [be] continent upon a loan . . . . I conveyed to him that I thought the trust would select a cash offer over a loan contingent offer, even with an increase in selling price of $720,000." Thus, exhibits to the FAP showed, contrary to Hitchko's claim that Forbes failed to "convey the offer that Bruce Hitchko was trying to present to the Co-Trustees," she did convey to the cotrustees that Hitchko wanted to make an offer on the Freshwater property for $720,000, and the offer would require financing.

[14] Boreing cited Hitchko's original petition filed in March 2013, in which he alleged that, on February 25, Forbes sent an email and "state[d] to the Co-Trustees that Bruce [Hitchko] approved the Co-Trustees accepting the McBeth offer." Further, an email attached as an exhibit to the FAP showed Michael emailed Boreing on the afternoon of February 25, writing "Have the OK from Barb, Bruce and Keith. I know we didn't need their consent, but it was a good idea to keep all in the loop."

Moreover, in a deposition taken April 18, 2013, Hitchko was asked whether he ever told Michael that he consented to the trust accepting the McBeth offer, and he responded, "From my understanding, . . . the cash offer was more attractive than the offer of me having to get a loan and taking—I'm not quite sure about how long a loan goes through, 30 or 40 days or whatever. So the cash offer was going to be immediately there, and . . . Forbes suggested to the co-trustees at that time that the cash offer was more

Hitchko failed to allege any violation of the January 25 order. Finally, Boreing argued that Hitchko stated *none* of the elements for a claim of intentional infliction of emotional distress.

On November 18, 2014, the trial court, Judge Thomas A. Smith sitting on assignment, heard argument on the demurrers. The court determined that the McBeth letter was not a material fact and therefore Boreing was under no duty to disclose it to the beneficiaries. The court reasoned, "[I]t's just a letter saying, 'I have some clients that I believe are credit worthy, and I am suggesting to them that this property may go on the market for 7 to 800,000.' That's all it is. . . . It's not a material fact. . . . [T]he letter is meaningless, and that throws out most of the causes of action." For this reason, the court found Hitchko's attempts to undo the sale (causes of action 1 through 4) and his claim of breach of fiduciary duty against Boreing (cause of action 6) failed to state a claim.

As to the claims of breach of contract and negligence against Forbes (causes of action 5, 7, and 8), the court found Hitchko failed to state a claim because Exhibit Q4 to the FAP demonstrated Forbes fully disclosed to the cotrustees Hitchko's intentions to make an offer for the Freshwater property.[15]

After considering the papers, oral argument, and the pleadings, files, and records in the probate case and the pleadings, files, and records in the *Hitchko* civil lawsuit, the trial court sustained defendants' demurrers without leave to amend and signed a judgment of dismissal.

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attractive to them at that time. And I said, well, you need to do what you need to do at that time about accepting a $700,000 cash or a higher bid of mine, being 725—I said you need to do that." (The deposition testimony was submitted by Forbes in support of her demurrer. (See *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605 (*Del E. Webb*) [in deciding a defendant's demurrer, the trial court may take judicial notice of inconsistent statements in the plaintiff's deposition].))

[15] The trial court did not expressly address the remaining claims of interference with contractual relations and prospective economic benefit against Rob McBeth and intentional infliction of emotional distress during oral argument.

DISCUSSION

A. *Standard of Review*

" 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." ' " (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400 (*Hoffman*).) We also consider the complaint's exhibits and matters subject to judicial notice. "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts that are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded. . . .' " (*Ibid.*) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In addition, " 'where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them,' " we " 'may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' " (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (*Vallejo Development*).) "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false. [Citation.] Likewise, the plaintiff may not plead facts that contradict the facts or positions that the plaintiff pleaded in earlier actions or suppress facts that prove the pleaded facts false." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877, italics omitted.)

"If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion

and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) With these standards in mind, we address whether Hitchko has stated a cause of action against any defendant.

B. *Sixth Cause of Action for Breach of Fiduciary Duty Against Boreing*

Hitchko alleged Boreing breached his fiduciary duty, first, in failing to disclose to Hitchko the existence of the McBeth letter and, second, in accepting the McBeths' offer "without properly marketing the property." We conclude Hitchko's allegations fail to state a claim against Boreing.

A trustee "has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration." (Prob. Code, § 16060.) "A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust." (Prob. Code, § 16400.) Probate Code section 16463 provides that a beneficiary may *not* hold a "trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the act or omission," but this does not apply "[w]here the beneficiary at the time consent was given did not know of his or her rights and of the *material facts* (A) that the trustee knew or should have known and (B) that the trustee did not reasonably believe that the beneficiary knew." (Italics added.) In the FAP, Hitchko alleged, "any indication of cooperation or acquiescence that he may have given to the sale to the McBeths at $705,000 was obtained improperly by the Co-Trustees and did not constitute consent" because he "did not know of certain material facts that the Co-Trustees knew or should have known."

With respect to the McBeth letter, Hitchko quotes Comment D to Restatement Second of Trusts, section 173 (1959), which provides, "if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts." But on its face and considered in context, the McBeth letter was not a fact that made the Freshwater property much more valuable than

Hitchko believed it to be. As the trial court succinctly stated, "[I]t's just a letter saying, 'I have some clients that I believe are credit worthy, and I am suggesting to them that this property may go on the market for 7 to 800,000.' That's all it is. . . . It's not a material fact. . . . [It's] meaningless."

In opposing the demurrers to the SAC in the *Hitchko* civil lawsuit, Hitchko's counsel promised, "We will present the letter from the McBeths . . . *offering* 800,00 in an as-i[s] condition . . . ." (Italics added.) Now on appeal, however, Hitchko agrees with the trial court that the touted McBeth letter was *not* an offer. Nonetheless, he continues to characterize the letter as establishing as an unequivocal fact that the McBeths would have been willing to pay $800,000 cash for the Freshwater property. But the McBeth letter did no such thing. Christensen wrote that the McBeths were interested in the property but that they had not even been shown it yet. Reasonably understood, the letter was a statement of interest only; it did not suggest a promise to submit an offer at any price. Accordingly, we agree with the trial court that the McBeth letter was not a material fact in relation to the sale of the Freshwater property, and, therefore, Boreing had no duty to inform the beneficiaries of its existence.

As to Hitchko's vague assertion that Boreing did not "properly" market the property, this is insufficient to state a claim of breach of fiduciary duty. Hitchko argues it was a breach of fiduciary duty to sell the property "without any advertising or meaningful exposure on the multiple listing service." Boreing responds that Hitchko did not and cannot allege that the Freshwater property was sold under market value or that Boreing was aware of alternative offers. The FAP and attached exhibits showed that the trust hired Forbes to sell the Freshwater property, Forbes prepared a summary of comparable listings (pending, active, and expired) and suggested an estimated selling price of $675,000, and, after the property was listed for sale, the McBeths quickly made an all-cash offer over the asking price. The exhibits further showed that Boreing was informed by Michael that Hitchko consented to accepting the offer from the McBeths. These allegations, without more, do not state a claim that Boreing breached a duty to the beneficiaries in the manner he sold the Freshwater property.

Hitchko's remaining arguments lack merit. He argues his claim against Boreing should survive because the FAP adequately alleged "Boreing gave substantial assistance or encouragement to the McBeths [and Forbes] while breaching his own fiduciary duties to the trust beneficiaries." He cites *Casey v. U.S. Bank National Assn.* (2005) 127 Cal.App.4th 1138, 1144, in which the court stated, " ' "Liability may. . .be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citations.]' [Citation.]" Hitchko argues that Boreing aided and abetted the McBeths and Forbes in their tortious goals, "while breaching fiduciary duties to the beneficiaries that the McBeths did not owe—under the second prong of the *Casey* test." This adds nothing to Hitchko's claim, however. The second prong of the *Casey* test requires allegations that Boreing breached his fiduciary duties to the beneficiaries, but Hitchko does not identify any additional duty Boreing allegedly breached.

Hitchko also argues that the emails he attached as exhibits to his FAP "are not the proper subject for judicial notice unless they are admissions by the party they are sought to be used against." Boreing responds that Hitchko has forfeited this argument because he failed to raise it in the trial court. (See *Keener v. Jeld-Wen, Inc*. (2009) 46 Cal.4th 247, 264 [the forfeiture rule "is designed to advance efficiency and deter gamesmanship"].) We do not approve of Hitchko raising this argument for the first time on appeal. In any event, his argument is unavailing because the emails were *attached to his own pleadings*. Under the doctrine of truthful pleading, we need not close our eyes to the fact that Hitchko's position is inconsistent with the attached documents to the FAP. (*Hoffman*, *supra*, 179 Cal.App.4th at p. 400; *Del E. Webb*, *supra*, 123 Cal.App.3d at p. 604.) Indeed, exhibits attached to a pleading " 'will take precedence over and supersede any inconsistent or contrary allegations set out in the pleading. In the case of such a conflict, we will look solely to the attached exhibit.' " (*Westamerica Bank v. City of*

Berkeley (2011) 201 Cal.App.4th 598, 607 (*Westamerica Bank*).) Thus, we accept the emails, not because they would be subject to judicial notice, but because Hitchko himself incorporated them in his pleadings.

Finally, Hitchko urges that he should not be held to a strict pleading standard, citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531. But, under *Doe*, a "plaintiff must set forth the essential facts of his or her case ' " ' "with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent" ' " ' of the plaintiff's claim. Legal conclusions are insufficient." (*Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1120, citing *Doe*, *supra*, at pp. 550 & 551, fn. 5.) Here, Hitchko's sixth cause of action against Boreing fails to state a claim because the factual allegations of the FAP and attached documents did not describe a breach of fiduciary duty and Hitchko's contentions, deductions, and legal conclusions were insufficient. (*Ibid*.; see *Hoffman*, *supra*, 179 Cal.App.4th at p. 400.)[16]

C. *Fifth, Seventh, and Eighth Causes of Action Against Forbes*

Hitchko's claims against Forbes are based on allegations that she failed to advise him of the risks of having a dual agent as his buying agent, that she failed to convey the offer he was trying to present to the cotrustees, and that she was somehow responsible for not informing him of the existence of the McBeth letter. We agree with Forbes and the trial court that Hitchko's factual allegations fail to state a claim against Forbes.

First, Forbes was permitted to act as a dual agent, and Hitchko received full disclosure on the issue and signed a consent form. (See *Horiike v. Coldwell Banker Residential Brokerage Company* (2016) 1 Cal.5th 1024, 1030 ["The law permits dual agency, provided that real estate agents both inform their clients of the agency relationships involved and obtain the clients' consent."] Moreover, the allegation that

[16] Moreover, we agree with Boreing (and the other defendants), that the doctrine of less particularity should not apply under the circumstances of this case to salvage Hitchko's claims because the FAP represents Hitchko's fifth attempt to state claims related to the sale of the Freshwater property and followed over a year of discovery.

Forbes did not advise Hitchko about the risks of having a dual agent fails to state a claim because Hitchko did not allege how this omission caused him harm. Hitchko's own allegations showed he never completed an offer signed by his cobuyer Chaffey, and the cotrustees were aware of his intention to make an offer for $720,000.

Second, the allegation that Forbes did not convey the offer Hitchko was trying to present to the cotrustees was contradicted by emails Hitchko attached as exhibits to the FAP and cited by the trial court.[17] Further, Hitchko himself contradicted this allegation in his reply brief to this court, in which he asserted Forbes "went to the trustees and *told them about [Hitchko's] offer*, but advised them to reject it in favor of the McBeth offer." (Italics added.)

Finally, assuming Forbes had a duty (as either the trust's selling agent or as Hitchko's agent) to disclose material facts to Hitchko, the McBeth letter was not a material fact requiring disclosure for the reasons we discussed above.

On appeal, Hitchko argues, "the FAP also alleges many more breaches of duty by Forbes in addition to [the claim that she never conveyed his offer to the co-trustee]." He contends the following acts constituted a breach of duty: (1) not exposing the property to market, (2) recommending that the trustees take the McBeths' offer without making a counter-offer, (3) not advising the trustees to set an initial price of at least $800,000. As we summarized above, the FAP and attached exhibits also showed that Forbes prepared a summary of comparable listings (pending, active, and expired), that she recommended a listing price of $675,000, and that the Freshwater property was listed for sale on the MLS. We further observe that Hitchko did *not* allege the fair market value of the

[17] The emails in Exhibit Q4 showed Forbes emailed Boreing and Michael on February 23 reporting that she was going meet with Hitchko the next day because he wanted to make an offer on the Freshwater property, and on February 25, Forbes told them about Hitchko's intention to make an offer for $720,000, and the offer was contingent on obtaining a loan. Hitchko's allegations "must yield to contrary allegations contained in exhibits to" the FAP. (*Vallejo Development, supra,* 24 Cal.App.4th at p. 946; see *Westamerica Bank, supra,* 201 Cal.App.4th at p. 607.)

Freshwater property was $800,000. (To the contrary, he seemed to believe his inchoate "offer" of $720,000 should have been accepted by the trust over the McBeths' offer.) Considered in context with the other allegations in the FAP, Hitchko's factual allegations do not state a breach of any duty by Forbes to the trust.

D. *First through Fourth Causes of Action*

Probate Code section 18100, subdivision (b), "fully protect[]s" a third party in "dealing with a trustee . . . in the conduct of a transaction," so long as "the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them." Moreover, '[t]he third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise." (*Id*., subd. (a).)

Hitchko's first through fourth causes of action alleged generally that Boreing and Forbes violated the January 25 order and their fiduciary duties, and the McBeths had actual knowledge of these violations. These claims fail because Hitchko has failed to state any wrongdoing by Boreing or Forbes. We have already concluded that Hitchko fails to state a claim of breach of fiduciary duty against Boreing and fails to state a claim of breach of contract or negligence against Forbes.

In the first through fourth causes of action, Hitchko has further alleged that Boreing and Forbes violated the court's January 25 order, which authorized the cotrustees "to take all reasonable action necessary to present the property for sale and to maximize its salability and price, including, but not limited to, removing any occupants, vehicles, trailers, and livestock from the property." But Hitchko's factual allegations did not state a failure to take reasonable action, and, to the contrary, the exhibits attached to his FAP indicated Boreing and Forbes acted reasonably in selling the Freshwater property.

Without any breach by Boreing, the McBeths could not have "actual knowledge that the trustee [was] exceeding the trustee's powers or improperly exercising them." (Prob. Code, § 18100.) We further agree with the McBeths that, even if we assume Hitchko stated a claim of breach of fiduciary duty against Boreing, Hitchko's bare

allegation of "actual knowledge" without any factual allegations from which such knowledge could be inferred is insufficient to state a claim against the McBeths.

E. ***Ninth and Tenth Causes of Action Against Robert McBeth***

"The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co*. (1990) 50 Cal.3d 1118, 1126.) The elements of intentional interference with prospective economic advantage "are usually stated as follows: ' "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' " (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1153.)

In the ninth and tenth causes of action, Hitchko asserted Robert McBeth interfered with Hitchko's contractual relations and prospective economic advantage, respectively. However, Hitchko's own allegations were that the McBeths submitted an offer on February 22, and, in response, he tried to put together a competing offer on February 24. These allegations obviously do not constitute either tort by Robert McBeth.

On appeal, Hitchko asserts that the McBeths knew, probably by February 15, and no later than March 1, that he was attempting to make an offer to purchase the Freshwater property and "knew that [his] efforts to submit an offer greater than the McBeths had been rebuffed by Sue Forbes." These additional allegations do not state a claim. Assuming the McBeths learned that Hitchko wished to submit a competing offer, they had no duty to ensure Hitchko had a chance to submit a formal offer to the cotrustees. As the McBeths reasonably point out, if Hitchko's allegations were sufficient, "literally any

real estate transaction would be subject to a suit by a party that claimed they wanted to make an offer, but did not."

F. ***Eleventh Cause of Action for Intentional Infliction of Emotional Distress***

Finally, we conclude Hitchko has failed to state a claim of intentional infliction of emotional distress. "To state a cause of action for intentional infliction of emotional distress, the plaintiff must allege (1) extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. [Citation.] Further, the conduct alleged 'must be " 'so extreme and outrageous "as to go beyond all possible [bounds] of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." ' " ' " (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1607-1608.) The factual allegations contained in the FAP and attached exhibits do not, as a matter of law, describe extreme and outrageous conduct by any defendants.

G. ***Leave to Amend***

The FAP represents Hitchko's fifth attempt to state claims against defendants over the course of 14 months. When Judge Miles sustained the demurrers to the second amended complaint in the Hitchko civil lawsuit, she essentially gave him one more chance to state a claim in the probate court. Yet, Hitchko filed two petitions (the original petition and the FAP) in the probate court. Under the circumstances, he is not entitled to leave to amend his petition again. Hitchko's recitation of newly-acquired information does not change our conclusion.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.